Advies inzake mogelijkheden, betekenis en wenselijkheid van het gebruik door politici van de term genocide

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ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

and

EXTERNAL ADVISER ON PUBLIC INTERNATIONAL LAW (EVA)

JOINT ADVISORY REPORT

Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians

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List of abbreviations

AIV	Advisory Council on International Affairs
CAVV	Advisory Committee on Issues of Public International Law
EP	European Parliament
EVA	External Adviser on Public International Law
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
R2P	Responsibility to Protect
UN	United Nations

Preface

On 29 November 2016 the House of Representatives of the States General adopted the following motion:

> 'The House,
>
> having heard the deliberations,
>
> observing that the European Parliament, the Parliamentary Assembly of the Council of Europe and the United States House of Representatives have characterised the atrocities committed by ISIS against Yazidis, Kurds, Christians and other ethnic and religious minorities, and against Muslims who disagree with ISIS' extremist interpretation of Islam, as crimes against humanity and genocide;
>
> considering that establishing whether conduct meets the legal definition of genocide is always a determination to be made by a court but that such determinations often take years, while the political recognition that the crime has been committed is of great importance, not least because it enables the affected groups to process their grief;
>
> requests that the government commission an advisory opinion from the External Adviser on Public International Law (*Extern Volkenrechtelijk Adviseur*, EVA) and the Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV) and ask that they prepare a joint report for the purpose of creating clarity regarding the scope for and the desirability and significance of the use of the term "genocide" by politicians, in general and in relation to the aforementioned atrocities in the Middle East.'

In his letter of 19 December 2016 the Minister of Foreign Affairs asked the External Adviser on Public International Law (EVA) and the Advisory Committee on Issues of Public International Law (CAVV) to prepare a joint advisory report in accordance with the motion. The minister added that, in view of the deliberations on the motion in the House of Representatives, the use of the term 'crimes against humanity' could also be examined in the report, if so desired. Given the topicality of this issue, the minister requested that the advisory report be issued by 1 March 2017 if possible.

A draft report was drawn up by the EVA, Professor P.A. Nollkaemper, and by Professor L.J. van den Herik, Professor J.G. Lammers and Dr G.R. den Dekker of the CAVV. The CAVV discussed the structure of the report on 23 February 2017. In addition, a procedure allowing all CAVV members to respond to draft versions of the advisory report by email was used. The EVA and the CAVV adopted the final text on 3 March 2017.

1. Introduction: point of departure and key terms

This advisory report examines the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians. In accordance with the minister’s suggestion, the term ‘crimes against humanity’ will also be examined in the report.

The question of how politicians in general and parliament in particular use terms defined in public international law and the implications of that usage is not unique to the terms ‘genocide’ and ‘crimes against humanity’. This issue can arise in a variety of contexts, including with regard to intervention, the use of force, aggression or war crimes. For instance, parliamentary debates about the Netherlands’ contribution to missions in Iraq and Syria include implicit and explicit determinations pertaining to the legitimacy of the use of force from the perspective of international law. In accordance with the request for advice, the advisory report will address only the terms ‘genocide’ and ‘crimes against humanity’.

Before the issues of scope, significance and desirability are addressed, the meaning of the key terms used in the report will be explained in this introduction.

In order to answer the question posed in the motion, it is important to define what is meant by the word ‘politicians’. To begin with, this advisory report refers only to politicians at the central level of the state, to the exclusion of politicians at other levels of government. The report also makes a distinction between politicians who are members of government and politicians who are members of parliament. The focus is on the latter group and, more specifically, on motions that can be adopted by parliament and as such can be considered to convey parliament’s position. This choice is in keeping with the examples given in the first paragraph of the motion upon which the request for advice is based. Positions of individual politicians expressed within parliament or elsewhere (for example, in the media) fall outside the scope of this report.

The request for advice refers to ‘the use’ of the term genocide by politicians in reference to particular crimes. In this report, the EVA and the CAVV use the phrase ‘determination of genocide’. In this context, making a ‘determination’ means judging that a particular set of circumstances amounts to genocide. As explained in sections 3 and 4, the legal consequences under public international law hinge on the nature of the expression and the actor.

It is also important to define the terms ‘genocide’ and ‘crimes against humanity’. Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide.[1] The Rome Statute of the International Criminal Court contains the same definition.[2] According to this definition, genocide covers a number of crimes committed with intent to destroy a national, ethnical, racial or religious group. Genocide therefore concerns not just crimes against a group, but crimes specifically committed with the intention of destroying

[1] United Nations, *Treaty Series*, vol. 78, p. 277, *Dutch Treaty Series* 1960, 32, amended by *Dutch Treaty Series* 1966, 179.
[2] United Nations, *Treaty Series*, vol. 2187, p. 3, *Dutch Treaty Series* 2000, 120, amended by *Dutch Treaty Series* 2013, 13; 2011, 73.

the group as such. The Rome Statute contains an additional dimension in that the crimes must have taken place in the context of a manifest pattern of conduct that threatens the existence of the group as such.[3]

Unlike the position with regard to genocide, there is no general convention on crimes against humanity. A definition of crimes against humanity can now be found in the Rome Statute and the general consensus is that this definition is largely consistent with customary international law. According to this definition, crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[4] Such crimes can be committed in times of war and of peace.

Genocide and crimes against humanity are closely related in terms of the development of the law and by their nature. There is also a degree of overlap in terms of substance. For acts to be characterised as genocide or crimes against humanity they must be committed systematically or on a certain scale. State involvement is not necessarily a requirement. Such acts can also be committed by non-state actors and groups. However, there is as yet no definitive answer to the question of what type of non-state groups can commit these offences. Important criteria mentioned in the debate on crimes against humanity are organisational structure, having the resources and capability to mount attacks, the group's objective and the acts committed by the group.[5]

Before the questions concerning scope, significance and desirability posed in the motion are addressed (in sections 3, 4 and 5, respectively) a number of examples will be given in the next section to illustrate parliamentary practice with respect to making determinations of genocide and/or crimes against humanity.

[3] The ICC's *Elements of Crimes* sums up the elements of the crimes the Court prosecutes. With regard to genocide, the *Elements of Crimes* states the following requirement: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.' See also *Prosecutor v. Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 124-125. The ICTY rejected the requirement that a determination of genocide depends on the relevant conduct presenting a concrete threat to the existence of the targeted group. ICTY, *Prosecutor v. Krstić*, 19 April 2004, para. 224 and *Prosecutor v. Popović et al.,* 10 June 2010, para. 829.

[4] Various underlying acts can be characterised as crimes against humanity if they were perpetrated as part of an attack of this nature, including wilful killing, extermination, enslavement, deportation, imprisonment, torture, rape and sexual slavery, persecution, enforced disappearance of a person, the crime of apartheid.

[5] See Christopher Hall / Kai Ambos, Commentary on Article 7, in *The Rome Statute of the International Criminal Court; A Commentary*, 3rd edition, Beck, Hart, Nomos, paras. 109-110, and the references to relevant case law there.

2. The practice of other parliaments

As the motion observes, there are multiple examples of situations in which parliaments have made determinations of genocide or of crimes against humanity.

In 1987 the European Parliament adopted a resolution on the Armenian Question stating that the events of 1915–1917 constituted genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide.[6] The European Parliament also recognised the persecution of Roma by Nazi Germany during the Second World War[7] and the events in Srebrenica of July 1995[8] as genocide. In a resolution adopted in 2016, the European Parliament stated that Islamic State (IS) is committing genocide against Christians, Yazidis and other religious and ethnic minorities, and urged states to fulfil their obligations under international law (including the Genocide Convention).[9]

Members of the Parliamentary Assembly of the Council of Europe issue written declarations with some regularity characterising the Armenian Question as genocide.[10] In a 1994 resolution the Parliamentary Assembly also referred to the acts of Saddam Hussein's Iraqi regime against the Ma'dān (Marsh Arabs) as genocide.[11] In a resolution adopted in 2016 the Assembly urged states to act on the assumption that Islamic State (IS) is committing genocide and to fulfil their obligations under the Genocide Convention.[12]

The US House of Representatives and the US Senate have used the term 'genocide' in the Armenian context,[13] and in the context of events in Bosnia and Herzegovina (1992–1995), in particular in Srebrenica.[14] The US House of Representatives and/or the US Senate have also used the term 'genocide' in other cases, primarily in the context of the protection of religious and ethnic minorities in the Middle East. For example, Congress has called for the acts of Islamic State (IS) in Iraq and Syria, in particular those targeting Christians and Yazidis, to be recognised as war crimes, crimes against humanity and genocide.[15]

Parliaments of a number of other states have also made determinations of past and present acts of genocide. For example, the parliaments of France and Germany have characterised the mass murder of Armenians in 1915 as genocide,[16] and Sweden's parliament included the attacks against the Assyrians in the same period.[17] The question of whether the mass killings in Namibia should also be designated as genocide was answered in the affirmative

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[6] EP Resolution, 18 June 1987, OJ C 190, p. 119. Repeated in others, including EP Resolution 15 April 2015, 2015/2590 (RSP).
[7] EP Resolution, 15 April 2015, 2015/2615 (RSP).
[8] *Inter alia* EP Resolution, 9 July 2015, 2015/2747 (RSP).
[9] EP Resolution, 4 February 2016, 2016/2529 (RSP).
[10] E.g. Doc. 13770, Written Declaration no. 591, 23 April 2015, 171 signatories.
[11] Council of Europe: Parliamentary Assembly, Resolution 1022 (1994), 27 January 1994.
[12] Council of Europe: Parliamentary Assembly, Resolution 2091 (2016), 27 January 2016.
[13] House Joint Resolution no. 148, 9 April 1975 and House Joint Resolution no. 247, 12 September 1984.
[14] House Resolution 310, 8 July 2015.
[15] House Concurrent Resolution 75, 14 March 2016; Senate Resolution 340, 7 July 2016.
[16] See Loi nº 2001-70, 29 January 2001, J.O. of 30 January 2001, p. 1590 and Deutscher Bundestag, Plenarprotokoll 18/173, Stenografischer Bericht, 173. Sitzung, 2 June 2016, pp. 17027-17039.
[17] Sveriges Riksdag, Riksdagens protokoll 2009/10:86, 11 March 2010.

by the German government at the urging of the German parliament.[18] Another example is the 1932-33 famine in Ukraine, known as the Holodomor, which the Ukrainian parliament characterised as genocide in 2006.[19]

A more recent example is a motion adopted by the UK House of Commons concerning the violence against Christians and other minorities in Syria and Iraq. It bluntly observes that 'this disgusting behaviour clearly falls within the definition of genocide'.[20] The Canadian parliament adopted a motion in October 2016 characterising the violence against the Yazidis as genocide and referring to the report issued by the United Nations Commission of Inquiry on Syria of June 2016.[21]

Occasionally, determinations by parliaments are linked to proposals to introduce a day of remembrance marking a specific event[22] or a day of remembrance connected in a more general sense to preventing and combating violence against ethnic and/or religious groups.[23] Parliamentary determinations can also be related to debates regarding genocide denial and financial compensation or other forms of reparation, including the making of formal apologies.

Two general points drawn from this brief overview can be carried forward to the analysis below. First, there seems to be a certain degree of selectivity. Parliaments appear to be more prepared to make determinations of genocide in cases where mass killings were not perpetrated in or by their own state or in cases in which the victims were their own nationals and the killings took place in another era (Holodomor). Adopting a selective stance carries political risks, as will be discussed in the section on desirability.

Second, a distinction can be made between determinations regarding historical genocides on the one hand and mass killings perpetrated in an ongoing conflict on the other. This distinction has legal relevance. In relation to historical genocides, the primary legal issues pertain to reparations and apologies. In turn, legal issues pertaining to the obligation to prevent genocide and crimes against humanity are particularly relevant where they relate to determinations concerning ongoing situations. In this advisory report, the EVA and the CAVV have confined themselves to addressing determinations regarding ongoing situations.

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[18] Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Niema Movassat, Wolfgang Gehrcke, Christine Buchholz, weiterer Abgeordneter und der Fraktion Die Linke, Drucksache 18/8859 (Sachstand der Verhandlungen zum Versöhnungsprozess mit Namibia und zur Aufarbeitung des Völkermordes an den Herero und Nama), Drucksache 18/9152, 11 July 2016.

[19] Verkhovna Rada of Ukraine, Про Голодомор 1932-1933 років в Україні, N 50, ст.504 (Law on the Holodomor of 1932-33 in Ukraine, Document Nº 376-V), adoption November 2006, date of entry into force 1 December 2006.

[20] UK House of Commons, Early Day Motion 1008, 26 January 2016.

[21] Canada, Parliament, House of Commons, Journals, 42nd Parl., 1st sess., Sitting no. 97, 25 October 2016, 910-913.

[22] E.g. EP Resolution, 15 January 2009 (day of remembrance for Srebrenica); Parliamentary Assembly of the Council of Europe Resolution 1723 (2010), 28 April 2010 (commemorating the victims of the Great Famine (Holodomor) in Ukraine (1932–1933)).

[23] E.g. House Joint Resolution no. 148, 9 April 1975 and no. 247, 12 September 1984.

3. Scope

The first question that the motion poses concerns the scope parliament has for using the terms ‘genocide’ and ‘crimes against humanity’.

There is no rule of international law that would prevent governments or parliaments from making a determination that ‘genocide’ and ‘crimes against humanity’ have been, are being or are about to be committed in a certain state.

The motion suggests that only the courts can make such determinations. This is a position that needs to be qualified. It is inherent in the international law system that states pronounce on questions of international law. Often there is no judicial body with the necessary jurisdiction, and international law would lose a great deal of its efficacy if it could not be applied without court decisions. In principle, therefore, it is up to states to make pronouncements on conduct of other states or persons that is relevant to international law.[24] This implies, too, that parliaments are not fettered by any rule prescribing that only courts are permitted to pronounce on genocide or crimes against humanity.

In this context, it is important to emphasise that, under international law, parliamentary determinations have a different legal significance than the acts of a government. From a legal perspective, states operate by means of their organs and in principle it is national law that determines which organs make up the state. This is not to say that each organ of state has the same significance in international relations.[25] For instance, in treaty negotiations, only the government of a state and, acting on its behalf, the head of state, head of government or the minister of foreign affairs have the authority to perform all the acts required to conclude a treaty. Other individuals may be able to perform certain acts that bind the state but only within the limits of the authority vested in them by the government of the state. With respect to the development of customary international law, in principle the acts of all organs of the state can contribute to this process. In particular, the determinations and positions expressed by the government both within and outside parliament can be deemed to be expressions of state practice and as such can contribute to the development of customary international law.[26]

As the chief representative of the state in international relations, it is up to the government to determine that genocide or crimes against humanity have been or are being committed in another state.

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[24] Or as stated in 1978 by the Arbitral Tribunal in its ruling in the case concerning the *Air Service Agreement of 1946* between the United States of America and France: ‘Under the rules of present-day international law, […], each State establishes for itself its legal situation vis-à-vis other States”, *Reports of International Arbitral Awards*, vol. XVIII, pp. 417-493, para. 81.

[25] See also Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, in particular Guiding Principle 4, *UN Doc.* A/61/10.

[26] Cf. ILC Rapporteur Michael Wood, *Second Report on the Identification of Customary International Law, VN Doc.* A/CN.4/672, 22 May 2014, para. 41(b).

This does not mean that parliament cannot express an independent position, for example by adopting a motion. One could even say that, in a democratic legal order such as that in the Netherlands, parliament has an obvious contribution to make in forming a judgment as to whether or not certain conduct constitutes genocide or crimes against humanity. However, positions taken by parliaments have no special significance in international law.

Besides making independent pronouncements on genocide and crimes against humanity, parliament can exert influence via the government, by inviting it to adopt the position that an act of genocide or crimes against humanity have occurred. If the government takes such a position at the request of parliament, this could have significance in international law (see section 4).

Although there are no obstacles in international law preventing governments or parliaments from using the terms ‘genocide’ or ‘crimes against humanity’, it is the view of the EVA and the CAVV that restraint should be exercised. Two considerations are of particular importance:

- *Thorough investigation of the facts is essential and in the absence of sufficiently reliable findings of fact, restraint is to be preferred.*

  Legal precepts are applied to facts. Consequently, a determination that an international standard has been violated can be made only on the basis of a rigorous and meticulous investigation of the facts. Determinations of genocide and crimes against humanity are extremely serious and it is essential that they be based upon thorough investigation. Furthermore, in determining whether particular conduct constitutes genocide, it is necessary to ascertain whether the acts were committed with the intent to destroy a particular group, as set out above. The burden of proof is substantial. In the absence of sufficiently reliable findings of fact, restraint is to be preferred.

- *Given the Netherlands’ commitment to advancing the international legal order, the preferred course of action is to support international determinations, but this need not be a reason to delay making national determinations.*

  Given the Netherlands’ commitment to advancing the international legal order, the preferred course of action is for the government and parliament to support the

determinations made by the relevant UN bodies.[27] A distinction can be made between (i) determinations by the UN Security Council or the General Assembly, in which the underlying facts are not stated in detail, (ii) determinations by UN commissions of inquiry, in which facts are ascertained and characterized in a more detailed and meticulous fashion, and (iii) determinations made by international courts and criminal tribunals.

The EVA and the CAVV see a role for parliament in calling for international procedures such as these to be carried out, in particular UN inquiries.

The preference for determinations to be made at international level need not be seen as a reason for delaying determinations at national level. It is also important to stress that not all international determinations are worthy of support; parliaments and governments should not base their own determinations on international findings that are merely political in nature and insufficiently supported by facts.

4. Significance

The EVA and the CAVV have interpreted the question regarding the significance of using the terms 'genocide' and 'crimes against humanity' as an inquiry into the legal implications, in particular for the Netherlands, of making such a determination.

In subsection 4.1 the obligation to prevent and punish the crime of genocide is examined more closely. Subsection 4.2 addresses the legal basis and substance of obligations to prevent and punish crimes against humanity and the extent to which these obligations differ from those pertaining to genocide. Subsection 4.3 explains that the two crimes are of equal gravity. Lastly, subsection 4.4 presents an interim conclusion that, because there is no essential difference in the gravity of the two crimes, the obligations to prevent them should, in substance, be the same too. More generally, this subsection asserts that the difference between genocide and crimes against humanity is irrelevant in the prevention phase, and that attention (including that of parliaments) should not be focused on terminological issues but rather on specifying the obligation to prevent both crimes and, in particular, which preventive acts and measures are called for.

[27] A similar position was adopted in a debate in the Canadian House of Commons about whether the Canadian government should characterise the violence committed by Islamic State (IS) against the Yazidis as genocide. Initially, a majority of Liberal MPs voted against a motion to that effect, because in their view the international authorities, and the UN Security Council in particular, should decide on this issue. Canada, Parliament, House of Commons, Journals, 42nd Parl., 1st sess., Sitting no. 72, 14 June 2016, 616-618.

4.1 The obligation to prevent and punish genocide

The obligation to prevent and punish genocide arises from article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide. The obligation to prevent genocide is vaguely formulated and the Convention provides no further specification of what it precisely entails. The only provision that gives any further detail is article 8, which allows Contracting Parties to the Convention to call upon the competent organs of the United Nations to take action under the Charter of the United Nations. The obligation to prevent stated in article 1 of the Convention must be interpreted within the confines of the UN Charter and does not provide an independent basis for military intervention beyond the scope of the UN Charter. The R2P doctrine,[28] which emphasises the responsibility of every state and the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, can be seen as a further specification of these provisions of the Genocide Convention. As the Advisory Council on International Affairs (AIV) stressed in a 2010 advisory report, this doctrine likewise cannot serve as an autonomous basis for the use of force without the authorisation of the UN Security Council.[29] The obligation to prevent genocide therefore does not in itself directly give rise to a duty to engage in military intervention, nor does it provide any legal justification for such an intervention.

In *Bosnia and Herzegovina v. Serbia and Montenegro case* (referred to below as 'the Genocide Case') the International Court of Justice made it clear that the obligation to prevent is a binding legal norm, not just a moral principle. The most important questions are who is subject to this obligation, what the obligation entails, and precisely what circumstances activate the obligation. The ICJ's judgment in the Genocide Case went some way to answering these questions. The Court found that the obligation to prevent is not limited by territory.[30] However, it added that the substance of the obligation to prevent genocide depends on the state's 'capacity to influence the action of persons likely to commit, or already committing genocide' and that this 'varies greatly from one state to another'.[31] Factors that determine a state's capacity to exercise influence include (i) the geographical distance from the state in question or the locality of the events, (ii) the closeness of political relations or other ties between the state and the most important actors in the events, (iii) the legal position of the state vis-à-vis the situation and those at risk of or being subjected to genocide, (iv) the state's degree of awareness of events.[32] The ICJ also ruled that the obligation to prevent is one of conduct, not one of result that would require a state to succeed in preventing the commission of genocide.[33] In addition the ICJ specified that the obligation to prevent arises when a state becomes or should have become aware of

[28] Outcome Document of the World Summit, *UN Doc.* A/RES/60/1, paras. 138-139.
[29] AIV, 'The Netherlands and the Responsibility to Protect: The Responsibility to Protect People from Mass Atrocities', Advisory report number 70, June 2010.
[30] ICJ, Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, para. 183. Referred to below as the 'Genocide Case'.
[31] Genocide Case, para. 430.
[32] Genocide Case, para. 432.
[33] Genocide Case, para. 430.

the existence of a serious risk of genocide being committed.[34] Despite these clarifications, the obligation to prevent has not as yet been fully defined. The precise substance of the obligation and in particular what types of preventive actions and measures states are expected to take remain largely unspecified.

The obligation to punish is more concrete in nature and is elaborated in multiple provisions of the Genocide Convention. It includes an obligation for states to cooperate with the international tribunals whose jurisdiction they have accepted. The Rome Statute, too, refers to the duty to prosecute international crimes. That being said, neither the Genocide Convention nor the Rome Statute explicitly requires states to establish universal jurisdiction. Nevertheless, a relatively large number of states, including the Netherlands, have implemented the Rome Statute in a way that creates universal jurisdiction over the crimes enumerated in the Statute. Clearly, prosecutors and courts, at both national and international level, have a decisive role to play in fulfilling the duty to punish perpetrators of international crimes. In addition, other national and international bodies have an independent responsibility to facilitate trial. The Syria Investigative Mechanism recently established by the UN General Assembly is a fitting example of an expression of this responsibility.

4.2 The obligation to prevent and punish crimes against humanity

The prohibition on genocide is contained in an international treaty regime that explicitly formulates states' obligations to prevent and punish genocide. There is no separate convention on crimes against humanity. The Genocide Case provides no clarification of the legal basis and substance of the obligations to prevent and punish crimes against humanity, or the extent to which these obligations differ from those relating to genocide. The ICJ clearly indicated that its judgment in that case pertained exclusively to the obligation to prevent genocide and that it did not intend to make any pronouncement on a general duty of states to prevent other violations of international law.[35] Nevertheless, an obligation to prevent crimes against humanity could be based on customary international law.

In his preparatory work for an international convention on crimes against humanity, Sean Murphy, Special Rapporteur of the International Law Commission (ILC), addresses the existence, substance and scope of an obligation to prevent crimes against humanity.[36] He provides a detailed analysis of the obligation to prevent in various conventions on human rights and transnational crimes. With reference to these international instruments and the ICJ judgment in the Genocide Case, the ILC adopted, in 2015, draft article 4, containing a general obligation to prevent crimes against humanity, complemented by a more specific obligation for states to take measures to prevent these crimes in territory under their jurisdiction.[37] The differentiation in draft article 4 between obligations for territorial states and other states is consistent with ICJ case law. Until such time as a provision similar to draft article 4 is incorporated into a convention, the obligation to prevent crimes against

[34] Genocide Case, para. 431.
[35] Genocide Case, para. 429.
[36] First Report on Crimes Against Humanity, *UN Doc.* A/CN.4/680, 17 February 2015, part V.
[37] ILC Report, *UN Doc*. A/70/10, 2015, paras. 108-117.

humanity must be based on customary international law or on more specific instruments such as those enumerated in Special Rapporteur Murphy's report. In the case of crimes against humanity, too, the substance of the obligation of prevention needs to be further specified.

With respect to the obligation to punish perpetrators of crimes against humanity, the absence of a separate convention elaborating this obligation is offset to some extent by the Rome Statute. Most states parties to the Statute have incorporated its definition of crimes against humanity in their national criminal law, in some cases making provision for universal jurisdiction as in the case of genocide. The Netherlands has done this in the International Crimes Act (*Wet internationale misdrijven*, WIM). As observed above, the Public Prosecution Service and the courts bear the largest share of the responsibility for fulfilling the obligation to punish. The Public Prosecution Service's role comprises conducting criminal investigations and initiating prosecutions. In addition, it is inherent in criminal law that individual criminal responsibility must be established by the court in accordance with certain procedural safeguards. Also other organs of the state may have a responsibility to enable the state to fulfil its obligation, for example by facilitating trial.

4.3 Is genocide more serious than crimes against humanity?

A question that arises from the foregoing is whether the obligation to prevent genocide is or should be the same as the obligation to prevent crimes against humanity, or whether there is reason to take a different approach to each of them. An argument for equating the two obligations on substance and taking the same approach would be that the two crimes are closely related in nature and substance and in terms of the development of the law. An argument for taking different approaches would be that genocide is more serious and therefore requires a more rigid regime. This subsection examines the question as to whether there is indeed a difference in severity between the two crimes.

Genocide is sometimes called 'the crime of crimes',[38] which suggests that it is the most serious international crime there is. Emotionally and intuitively people tend to believe that genocide is more serious, and this is expressed in a strong desire for this particular label to be used to condemn certain crimes. The term 'crimes against humanity' is more generic, and consequently may not evoke the same immediate associations and emotions as genocide. Whether acts of genocide are actually deemed more serious than crimes against humanity depends upon the point of reference. If intention is the point of reference, it could be argued that genocide is the more serious of the two because it is committed with the intention of destroying a group; this intention is not a necessary criterion for conduct to be characterized as a crime against humanity. If scale or the brutality of the underlying conduct is taken as the point of reference, in specific cases crimes against humanity may be more serious than acts of genocide, making it impossible to generalise that one is inherently more serious than the other. Another argument against hierarchical classification is that ranking the two crimes in this way would also lead to groups of victims being

[38] W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2nd ed., 2009. See also ICTR, *The Prosecutor v. Akayesu*, 2 October 1998, para. 8; ICTR, *The Prosecutor v. Musema*, 27 January 2000, para. 981; ICTR, *The Prosecutor v. Rutaganda*, 6 December 1999, para. 451.

ranked hierarchically: those targeted by crimes against humanity would be deemed to be victims of a less serious crime. This is not desirable; the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) repeatedly and emphatically states that genocide and crimes against humanity are equally grave offences.[39]

Likewise, the International Commission of Inquiry on Darfur was clear on this point:

> '[G]enocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*.'[40]

Given the emotive value that the genocide label has for many people, the Darfur commission felt obliged to add:

> 'The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from or belittling the gravity of the crimes perpetrated in that region.'[41]

Consequently, the question as to whether genocide is, in a legal sense, a more serious offence than crimes against humanity is generally answered in the negative. In individual cases, however, it is possible to differentiate between the two, for example in sentencing, but the underlying complex of facts is more likely to play a decisive role than the characterisation of those facts as such.

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[39] ICTR, *The Prosecutor v. Kayishema and Ruzindana*, 1 June 2001, para. 367 ('[...] there is no hierarchy of crimes under the Statute, and [...] all of the crimes specified therein are "serious violations of international humanitarian law", capable of attracting the same sentence.'); ICTR, *The Prosecutor v. Semanza*, 15 May 2003, para. 555 ('All of the crimes in the Statute are crimes of an extremely serious nature, rising to the level of international prohibition.'); ICTY, *The Prosecutor v. Tadić*, Opinion of Judge Cassese, 26 January 2000, para. 7 ('...one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them.').

[40] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights in Darfur, *UN Doc.* S/2005/60, para. 522 (italics and emphasis in the original document).

[41] Ibid.

4.4 Interim conclusion: differentiation not necessary in the prevention phase

Genocide and crimes against humanity are closely related, even largely overlapping offences. It therefore stands to reason that the obligation to prevent each of them should be deemed to be the same in terms of nature, substance and scope. If it is assumed that the obligation to prevent is the same for genocide and crimes against humanity, there is no need to differentiate between the two in the prevention phase. This position is consistent with the way in which the R2P doctrine is formulated. The Responsibility to Protect applies to both genocide and crimes against humanity. In addition, it bears mentioning that the recent French-Mexican proposal to restrict the right of veto in the Security Council (which the Netherlands supports) does not distinguish between the two offences either. This proposal uses the non-legal term mass atrocities, thereby emphasising that in the context of prevention, differentiating between international crimes is not of paramount importance.[42] In keeping with this, it would be preferable to consistently use the terms 'genocide' and 'crimes against humanity' together during the prevention phase, so that attention can be focused on continuing to equalise and specify the substance and scope of the obligation to prevent both crimes. This recommendation is directed towards both the government and parliament. Only the courts will distinguish between the two terms, in establishing liability; in the prevention phase, this kind of differentiation is of subsidiary importance.

5. Desirability

The third part of the question posed in the motion concerns the desirability of politicians' using the terms 'genocide' and 'crimes against humanity'. In light of the foregoing analysis, the EVA and the CAVV would make the following observations in this respect.

- *A necessary step on the road to prevention and intervention*

  Use of the term 'genocide' or 'crimes against humanity' may constitute an important first step on the road to political decision-making on prevention and intervention,[43] thus serving various interests (e.g. preventing further suffering, stopping refugee flows, etc.). As the previous section set out, international law imposes an obligation to prevent. The steps that actually need to be taken to prevent such crimes require a political decision-making process, which must be prompted by the use of these terms by politicians. Parliament can play an important role either by calling on the government to make a determination or by making a determination itself.

  As stated above, determinations of this nature should not be impeded by linguistic and legalistic discussions about the precise definition and specific use of the term 'genocide'; such debates have in the past formed obstacles to timely and effective prevention.[44] In the light of the close connection between genocide and crimes against

[42] See also the Code of Conduct of the Accountability, Coherence and Transparency Group, *VN Doc.* A/70/621-S/2015/978, 14 December 2015.
[43] Booker & Colgan, in: Straus, S., 'Darfur and the Genocide Debate', Foreign Affairs, 84:1 (2005), p. 8.
[44] Beardsley, B., 'The Endless Debate over the 'G Word', Genocide Studies and Prevention, 1:1 (2006), p. 79.

humanity it is neither necessary nor desirable to differentiate in the prevention phase between the two offences, as explained above.

- *International cooperation*

Determinations of genocide and crimes against humanity can also play an important role in bringing about international cooperation. Use of the terms 'genocide' and 'crimes against humanity' makes a strong moral and political appeal to other actors (e.g., states and international organisations) and public opinion. Because a state on its own is usually helpless in the face of impending or ongoing genocide or crimes against humanity, timely political recognition and acknowledgment of these international crimes is often the first step towards achieving the international cooperation necessary for intervention or prevention.[45]

Using the terms 'genocide' and 'crimes against humanity' may, as stated above, be a necessary step in fulfilling the Responsibility to Protect.[46]

- *Interpreting the obligation to prevent genocide and crimes against humanity*

As set out in section 3, what the obligation to prevent genocide and crimes against humanity exactly entails has not yet been clearly defined. Governments and parliaments can play a useful role by calling for or deciding on concrete measures aimed at prevention, and by doing so contribute to the further specification of this obligation.

In assessing whether it is desirable for parliaments to make determinations regarding genocide and crimes against humanity, it is, however, important to take into account the considerations set out in section 3 regarding the importance of conducting thorough investigations and supporting international determinations.

- *Political risks in international relations*

The EVA and the CAVV would observe that the use of the terms 'genocide' and 'crimes against humanity' also carries political risks. Unilateral use of these terms may render the state concerned part of a 'hegemonic Western discourse', which is not necessarily the most effective approach politically speaking. Using these terms is tantamount to an accusation against a foreign government and can prove counterproductive, for example when prevention measures necessitate obtaining that government's consent to the deployment of UN peacekeepers[47] or even an international fact-finding commission. In this respect, too, reference is made to the remarks in section 3 on the preference for international determinations.

[45] General Assembly, Security Council, 'Mobilizing collective action: The next decade of the responsibility to protect', *VN Doc.* A/70/999-A/2016/620, 22 July 2016, pp. 12, 18.
[46] Outcome Document of the 2005 World Summit, *UN Doc.* A/RES/60/1, 24 October 2005, para. 138-139.
[47] Mennecke, M., 'What's in a Name? Reflections on Using, Not Using, and Overusing the "G-Word"', *Genocide Studies and Prevention*, 2:1 (2007), p. 61.

- *Devaluation of the terms 'genocide' and 'crimes against humanity'*

If, after the terms 'genocide' and 'crimes against humanity' are used, effective measures are not taken, this can have the effect of devaluing these terms. The resulting disconnection between their use and concrete legal and political consequences undermines them and, consequently, the legal norm they represent.[48]

6. Conclusion and recommendations

The advice given in this report can be summarised in 10 statements:

1. The assertion that only the courts can make a determination as to whether conduct meets the legal definition of genocide or crimes against humanity needs to be qualified.

2. As the chief representative of the state in international relations, the government bears primary responsibility for determining that genocide or crimes against humanity have been or are being committed in another state.

3. It is possible for a parliament to adopt an autonomous position but such a position has no special significance in international law. Parliament can invite the government to take the position that genocide or crimes against humanity have been or are being committed.

4. Although both governments and parliaments are at liberty to speak out about genocide and crimes against humanity, restraint is in order.
    a. A thorough investigation of the facts is essential and in the absence of sufficient and reliable findings of fact, restraint is to be preferred.
    b. Given the Netherlands' commitment to advancing the international legal order, the preferred course of action is to support international determinations, but this need not be a reason to delay making national determinations.

5. A determination that genocide or crimes against humanity are being or have been committed is a necessary first step in activating obligations, such as the obligation to prevent.

[48] Glanville, L., 'Is "Genocide" still a powerful word?', *Journal of Genocide Research*, 11:4 (2009), p. 482.

6. The precise substance of the obligation to prevent and the measures states are expected to take have not yet been clearly established. This is the case for both genocide and crimes against humanity.

7. Because genocide and crimes against humanity are closely connected, equivalent in terms of their nature and gravity, and largely overlap, the substance of the obligation to prevent should be the same for both offences.

8. The EVA and the CAVV recommend that there should be no differentiation between genocide and crimes against humanity during the prevention phase. They also advise using the two terms together as standard practice so that attention is focused not on terminological debates but on the more relevant question of what preventive acts and measures should be taken or continued.

9. Governments and parliaments can help further the development of the obligations to prevent genocide and crimes against humanity by calling for or deciding on concrete prevention measures.

10. The EVA and the CAVV recommend that the government support the ILC's efforts with respect to drafting a separate convention on crimes against humanity. In this context, too, the obligation to prevent can be elaborated and further specified, and thus make a genuine contribution to prevention.

ANNEXES

Request for advice on the use of the term ‘genocide’ by politicians, 19 December 2016

Members of the Advisory Committee on Issues of Public International Law

External Adviser on Public International Law

Annexe I

Request for advice on the use of the term ‘genocide’ by politicians, 19 December 2016

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Nederland
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Professor P.A. Nollkaemper
External Adviser on Public International Law

Professor R.A. Wessel
Chair
Advisory Committee on Issues of Public International Law

Date 19 December 2016
Re Request for advice on the use of the term 'genocide' by politicians

Dear Professors,

On 29 November 2016 the House of Representatives adopted a motion[49] requesting that the government obtain advice from the External Adviser on Public International Law (EVA) and the Advisory Committee on Issues of Public International Law (CAVV) and ask them to prepare a joint report. The motion reads as follows:

> 'The House,
>
> having heard the deliberations,
>
> observing that the European Parliament, the Parliamentary Assembly of the Council of Europe and the United States House of Representatives have characterised the atrocities committed by ISIS against Yazidis, Kurds, Christians and other ethnic and religious minorities, and against Muslims who disagree with ISIS's extremist interpretation of Islam, as crimes against humanity and genocide;
>
> considering that establishing whether conduct meets the legal definition of genocide is always a determination to be made by a court but that such determinations often take years, while the political recognition that the crime has been committed is of great importance, not least to enable the affected groups to process their grief;
>
> requests that the government commission an advisory opinion from the External Adviser on Public International Law (*Extern Volkenrechtelijk Adviseur*, EVA) and the Advisory

[49] Motion submitted by MP Joël Voordewind et al., Adoption of the budget statement of the Ministry of Foreign Affairs for the year 2017, Parliamentary Paper 34 550 V, no. 32, proposed on 24 November 2016.

> Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV) and to request that they prepare a joint report for the purpose of creating clarity regarding the scope for and desirability and significance of politicians using the term “genocide”, both in general and in related to the aforementioned atrocities in the Middle East .’

I hereby ask you and your Committee to draft a joint advisory report in accordance with this motion. In view of the deliberations on the motion in the House of Representatives, the use of the term ‘crimes against humanity’ could also be examined in the report, if so desired.

Given the topicality of this issue, I ask that you issue the report by 1 March 2017 if possible.

Yours sincerely,

Bert Koenders
Minister of Foreign Affairs

Annexe II

Members of the Advisory Committee on Issues of Public International Law

Members of the Advisory Committee on Issues of Public International Law

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Professor R.A. Wessel

Vice-chair
Professor L.J. van den Herik

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The Advisory Committee on Issues of Public International Law is an independent body that advises the government and parliament on international law issues.

Annexe III

External Adviser on Public International Law

External Adviser on Public International Law

Professor P.A. Nollkaemper

The External Adviser on Public International Law is available at all times to provide independent advice on his own initiative or at the request of the minister on important foreign policy issues involving aspects of international law.

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